Supreme Court, U.S.
FILED
FEB 24 2004
OFFICE OF THE CLERK

(2)

No. 03-7434

In the Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

ROBERT A. WALLIS, District Director,
Immigration and Naturalization Service,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

NORTH CAROLINA JUSTICE AND COMMUNITY DEVELOPMENT CENTER *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JAMES E. COLEMAN, JR.
Counsel of Record

BOX 90360
DURHAM, NC 27708
(919) 613-7057

*Attorney for Amicus Curiae
in Support of Petitioner*

Becker Gallagher Legal Publishing, Inc.
800.890.5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. INADMISSIBLE ALIENS SUCH AS DANIEL BENITEZ WHO ARE PHYSICALLY PRESENT WITHIN THE TERRITORY OF THE UNITED STATES ARE PERSONS UNDER THE FIFTH AMENDMENT AND THEREFORE ENTITLED TO DUE PROCESS OF LAW. 8

A. Due Process Rights Attach Once an Individual is Physically Present Within the Territory of the United States. 8

1. Justice Kennedy's Dissent in *Zadvydas* Appropriately Addresses the Threshold Constitutional Question Raised in this Case. 10

2. Justice Kennedy's Conclusions in *Zadvydas* are Firmly Rooted in this Court's Jurisprudence. 10

B. Holding that Aliens Paroled into the United States Do Not Have Due Process Rights Would Contradict the Purpose of the Entry Fiction and Irrationally Grant More Protection to Undetected Aliens than to Parolees Whose Presence Was Previously Deemed Benign. 12

II. DANIEL BENITEZ HAS A DUE PROCESS RIGHT TO JUDICIAL REVIEW OF HIS DETENTION. 13

A. Indefinite Detention Without Review of the Government's Reasoning Shocks the Conscience. 14

B. The Government Has the Burden to Show that a Detention is Reasonable. 15

C. International Law Also Condemns Indefinite Detention. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 17

Benitez v. Wallis, 337 F.3d 1289 (11th Cir. 2003) 8, 15

DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989) 15

Estelle v. Gamble, 429 U.S. 97 (1976) 15

Foucha v. Louisiana, 504 U.S. 71 (1992) 13

Kansas v. Hendricks, 521 U.S. 346 (1997) . . . 14, 15

Korematsu v. United States, 323 U.S. 214 (1944) . . 7

Lawrence v. Texas, 123 S. Ct. 2472 (2003) 16

Leng May Ma v. Barber, 357 U.S. 185 (1958) 13

Matthews v. Diaz, 426 U.S. 67 (1976) 12

Muller v. Oregon, 208 U.S. 412 (1907) 17

New York v. United States, 326 U.S. 572 (1946) . . . 17

The Paquete Habana, 175 U.S. 677 (1900) 16

Plyler v. Doe, 457 U.S. 202 (1982) 11, 13

Printz v. United States, 521 U.S. 898 (1997) 17

Reno v. Flores, 507 U.S. 292 (1993) 15

Rochin v. California, 342 U.S. 165 (1952) 14

Roe v. Wade, 410 U.S. 113 (1973) 17

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 8, 12

United States v. Montoya de Hernandez, 472 U.S. 531 (1985) 16

United States v. Salerno, 481 U.S. 739 (1987) . 14, 15

Wong Wing v. United States, 163 U.S. 228 (1896) . 11

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 11

Youngberg v. Romeo, 457 U.S. 307 (1982) 15

Zadvydas v. Davis, 533 U.S. 678 (2001) . . . . . *passim*

Statutes

United States Constitution, Amendment 5 . . . . *passim*

United States Constitution, Amendment 14 . . . *passim*

Immigration & Nationality Act § 212 (d)(5)(A), 8 U.S.C. § 1182 (d)(5)(A) (2000) 8

Other

Estimates of Numbers of Unauthorized Migrants Residing in the United States: The Total, Mexican, and Non-Mexican Central American Unauthorized Populations in Mid-2001 (Nov. 2001), *available at* http://www.pewhispanic.org/page.jsp?page=Content%20by%20Category (last visited Feb. 23, 2004). . . 3

Edward Bates Cole, *What Difference Does It Make Whether You Are Deportable or Excludable? The Supreme Court Refuses to Say*, 28 N.C. J. Int'l & Comp. Reg. 567, 567–68 (2003). 9

International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 168, U.N. Doc. A/6316 Art. 9 para. 4 (1967) 17-18

Marcus Stern, *INS jumps estimate of illegal immigrants: Number put at 8 million; growth rate is increased*, SAN DIEGO UNION-TRIBUNE, Jan. 31, 2003, *available at* http://www.signonsandiego.com/news/mexico/20030131-9999_1n31immig.html (last visited Feb. 23, 2004). 3

N.C. Department of Health and Human Services, *New Arrivals Report by Country of Origin, For Report Period 10/1/2001 to 7/24/2003* (internal report) (on file with the North Carolina Justice and Community Development Center). 3

http://www.ncjustice.org/about.htm. 1

http://www.ncjustice.org/ilap/index.html. 2

Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) 17

Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., 183d plen. Mtg. Art. 9, at 137, U.N. Doc. A/810 (1948) 17

United States Census Bureau, *Hispanic or Latino Origin: All Races. Mapping Census 2000: The Geography of U.S. Diversity* (Dec. 7, 2001), *available at* http://www.census.gov/population/www/cen2000/dt_atlas.html (last visited Feb. 23, 2004). 2

United States Census Bureau, *Percent Distribution of the Foreign-Born Population by World Region of Birth for the United States, Regions, States, and Puerto Rico: 2000, available at* http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (Table 4) (last visited Feb. 23, 2004). 2

INTEREST OF AMICUS CURIAE[1]

The North Carolina Justice and Community Development Center (Justice Center) was established to reduce, and ultimately, eliminate poverty in North Carolina by ensuring that low-income, working poor and minority individuals, and the communities in which they live, have the resources and services necessary to transition from poverty to economic security. To accomplish this mission, the Justice Center "works in collaboration with North Carolina's disadvantaged individuals and communities employing a multi-forum advocacy model in which the Center uses four primary strategies": litigation, research and policy development, public policy advocacy, and grassroots empowerment.[2] The goal of the Justice Center's litigation strategy is to "ensure that the rights of traditionally underrepresented populations are protected" by "undertaking high-impact litigation."[3] Daniel Benitez faces a similar plight to that faced by individuals on whose behalf the Justice Center advocates everyday. Such immigration cases fall squarely within the Justice Center's mission.

A core goal of the Justice Center is to ensure that immigrants and newcomers to the United States have the legal

---

[1] This brief is filed with the consent of the parties. No person or entity other than Amicus, their counsel, or their members made a monetary contribution to this brief. Amicus is grateful to Duke University School of Law students Judson D. Brown, Donald E. Childress III, and David H. Koysza for their invaluable contributions to this brief.

[2] *See* http://www.ncjustice.org/about.htm.

[3] *Id.*

resources necessary to ensure that their civil rights are protected and that immigrants have access to counsel in all immigration matters.[4] Through its Immigrants Legal Assistance Project, the Justice Center represents low-income immigrants in a variety of immigration matters in Immigration Court and before the Board of Immigration Appeals.

The proper resolution of this case is not only important to the Justice Center, it is especially important to the people of North Carolina. The population of North Carolina has changed greatly over the past twenty years. There are 392,599 North Carolinians who are Hispanic or Latino, approximately 5 percent of the State's total population.[5] Over the last decade, this segment of North Carolina's population grew by more than 394 percent, the largest percentage increase of any state in the country.[6] In addition to Latino and Hispanic immigrants, many people from other parts of the world make their home in North Carolina. Of the 430,000 foreign-born people in North Carolina, more than 93,000 are from Asia and more than 20,000 from Africa.[7] Over 1,700

---

[4] *See* http://www.ncjustice.org/ilap/index.html.

[5] *See* United States Census Bureau, *Hispanic or Latino Origin: All Races. Mapping Census 2000: The Geography of U.S. Diversity* (Dec. 7, 2001), *available at* http://www.census.gov/population/www/cen2000/dt_atlas.html (last visited Feb. 23, 2004).

[6] *See id.*

[7] *See* United States Census Bureau, *Percent Distribution of the Foreign-Born Population by World Region of Birth for the United States, Regions, States, and Puerto Rico: 2000, available at* http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (Table 4) (last visited Feb. 23, 2004).

refugees were resettled in North Carolina between October 2001 and July 2003, with the largest number coming from Vietnam, Bosnia/Herzegovina, Democratic Republic of Congo, Colombia, and Ukraine.[8]

North Carolina's diverse and fast growing alien-born population naturally attracts immigrants to North Carolina, both those who come legally and some who come illegally to join their relatives. Nationally, it is believed that almost 8 million persons reside in the United States without legal permission.[9] The Immigration and Naturalization Service (now the Bureau of Customs Enforcement) has estimated that over 206,000 undocumented persons live in North Carolina.[10]

As of February 5, 2004, the Justice Center was actively representing 391 individuals involved in immigration proceedings in the United States, including a large number of asylum seekers. Because the issues in this case raise important

---

[8] *See* N.C. Department of Health and Human Services, *New Arrivals Report by Country of Origin, For Report Period 10/1/2001 to 7/24/2003* (internal report) (on file with the North Carolina Justice and Community Development Center).

[9] *See Estimates of Numbers of Unauthorized Migrants Residing in the United States: The Total, Mexican, and Non-Mexican Central American Unauthorized Populations in Mid-2001* (Nov. 2001), *available at* http://www.pewhispanic.org/page.jsp?page=Conte..%20by%20Category (last visited Feb. 23, 2004).

[10] *See* Marcus Stern, *INS jumps estimate of illegal immigrants: Number put at 8 million; growth rate is increased*, SAN DIEGO UNION-TRIBUNE, Jan. 31, 2003, *available at* http://www.signonsandiego.com/news/mexico/20030131-9999_1n31immig.html (last visited Feb. 23, 2004).

questions of constitutional and immigration law that have a direct bearing on the mission and ongoing litigation of the Justice Center and on its clients in North Carolina, the Justice Center has an exceptionally strong interest in properly resolving this case to ensure the preservation of liberty and due process of law for all persons who are physically present within the United States.

SUMMARY OF ARGUMENT

Although the decision in *Zadvydas* controls the outcome in this case, the Court also must make clear that in the absence of special circumstances, not presented in this case, no person physically present within the United States may be detained indefinitely without due process of law. The plain language of the Fifth Amendment, bolstered by *Zadvydas* and over a century of this Court's jurisprudence, support the claims advanced by Petitioner. Indeed, if this Court finds for the Government, the result would be to accord greater constitutional protection to those illegal aliens who sneak across the border undetected than to those who are stopped and subsequently paroled in after a determination that their presence would be benign.

Denying parolees *any* opportunity to challenge the reasons for their re-arrest and indefinite detention violates not only the guarantees of the U.S. Constitution, but also principles of international law. The indefinite detention of a previously paroled alien shocks the conscience. It not only is antithetical to a century of this Court's jurisprudence, but also runs counter to the very foundation upon which this country was built and upon which the Constitution rests.

ARGUMENT

Three years ago in *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court was faced with a serious constitutional question regarding the Government's authority to detain indefinitely an alien whose presence posed no threat to the United States but who could not be deported. To avoid addressing that question, the Court invoked the doctrine of constitutional avoidance and held that the Immigration and Nationality Act's post-removal-period detention provision presumptively limited such detentions to six months, in the absence of special circumstances. *Id.* at 689–90. As this Court then noted: "A statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690. This case requires the Court again to confront the same constitutional problem.

As in *Zadvydas*, the Government claims that the alien in this case may be detained indefinitely. Although the context in which immigration issues are addressed has changed significantly in the three years since *Zadvydas*, nothing has changed that affects the fundamental soundness of that decision or that requires a different result in this case. The specter of terrorism unquestionably has changed the way many Americans view aliens and the process of immigration. But the issues in this case do not concern terrorism; nor has the Government sought to invoke in this case special authority given to or arrogated by it to combat terrorism. Rather, as in *Zadvydas*, this case concerns the constitutional limits on the discretion of the Government, in the absence of special circumstances, to arrest and detain indefinitely a previously paroled excludable alien who is physically present in the country, but whom the Government cannot deport.

The precise legal issue presented by the Government's position is whether an alien paroled into the United States under the so-called "entry fiction" is protected from indefinite detention by the Due Process Clause; or, whether the act of parole in the case of an excludable alien creates a special class of individuals who are physically present within the United States, but denied the constitutional protections afforded "all persons within the United States." U.S. Const. amend. V. This question exposes an apparent tension among important values: on the one hand, the constitutional protection of liberty and the collective distaste for incarceration without due process; and on the other hand, the United States's sovereign right to control who enters the country and its need to protect American communities from dangerous people. Amicus fully supports the position of Petitioner that this case ought to be decided in his favor on the basis of *Zadvydas*. But, because of the abuses that sometimes befall aliens, or those who look like aliens, in times of national crisis,[11] abuses directed at them because they look or sound different, Amicus urges the Court to make clear that in the absence of special circumstances, not presented in this case, no person physically present within the United States may be detained indefinitely without due process of law.

---

[11] *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944).

I. INADMISSIBLE ALIENS SUCH AS DANIEL BENITEZ WHO ARE PHYSICALLY PRESENT WITHIN THE TERRITORY OF THE UNITED STATES ARE PERSONS UNDER THE FIFTH AMENDMENT AND THEREFORE ENTITLED TO DUE PROCESS OF LAW.

The Government attempts to avoid the thrust of the decision in *Zadvydas* by invoking the so-called "entry fiction." Specifically, the Government argues that an inadmissible alien previously paroled into the country and who cannot be deported sits "on the threshold of initial entry" and thus is not entitled to due process of law. Brief for Appellee at 19–22, *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003) (No. 02-14324). The Government relies principally upon the decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). That decision, however, will not bear the enormous weight of the Government's position.

A. Due Process Rights Attach Once an Individual is Physically Present Within the Territory of the United States.

To begin with what is not disputed, the Immigration and Nationality Act authorizes the Attorney General to parole an excludable alien into the country, without his presence constituting an admission. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (2000). The Government argues further, however, that because such a parolee has not technically entered the United States under the immigration statutes, he "lacks any [constitutional] right against continued . . . custody even if such detention is infinite and prolonged." Brief for Appellee at 19–20, *Benitez v. Wallis*, 337 F.3d 1289 (11th

Cir. 2003) (No. 02-14324). The Government's position is rooted in the so-called "entry fiction," which allows the "United States to remove the alien at any time after his or her [parole] into the United States without a hearing and treats the alien, for constitutional purposes, as if he or she never entered the country." Edward Bates Cole, *What Difference Does It Make Whether You Are Deportable or Excludable? The Supreme Court Refuses to Say*, 28 N.C. J. Int'l & Comp. Reg. 567, 567–68 (2003). By virtue of this fiction, the Government claims that, although physically present within the United States, the parolee, for purposes of immigration law, remains on the threshold of initial entry, and thus is entitled to no protection under the Constitution. Whatever its status under the immigration laws, this fiction can play no role in determining the rights of aliens like Petitioner under the Fifth Amendment to the Constitution.

The protections of the Fifth Amendment attach once a person is physically present within the territory of the United States. As this Court has held, the Due Process Clause applies not only to citizens but to "all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Thus, the Government's position is sustainable only if a person physically present in the United States, although not legally admitted under the immigration laws, is deemed not present for constitutional purposes because he is an excludable parolee. Neither *Zadvydas* nor this Court's due process jurisprudence supports such a transparent evasion of the Fifth Amendment's guarantee of due process of law.

1. Justice Kennedy's Dissent in *Zadvydas* Appropriately Addresses the Threshold Constitutional Question Raised in this Case.

Justice Kennedy's dissenting opinion in *Zadvydas*, joined by the Chief Justice in relevant part, explicitly rejected the Government's position in this case. *Zadvydas*, 533 U.S. at 705 (Kennedy, J., dissenting). There, Justice Kennedy correctly linked the protections afforded by the Due Process Clause to an individual's physical presence within the United States: "As persons within our jurisdiction, the aliens are entitled to the protection of the Due Process Clause." *Id.* Accordingly, Justice Kennedy rejected the entry fiction argument entirely: "Still, both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Id.* at 721. Amicus suggests that this reasoning alone sufficiently lays waste to the Government's position. All persons who are physically present within the United States can invoke their right under the Fifth Amendment to due process of law. That includes persons invited to enter, those who enter illegally, and those who are paroled into the country from the threshold of entry; all are "persons within our jurisdiction, [and thus] entitled to the protection of the Due Process Clause."

2. Justice Kennedy's Conclusions in *Zadvydas* are Firmly Rooted in this Court's Jurisprudence.

For over a century this Court has recognized that due process protections are implicated by the mere physical presence of a person within the borders of the United States: "The [Fifth and] [F]ourteenth [A]mendment[s] [are] not

confined to the protection of citizens. . . . These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Indeed, even illegal, inadmissible aliens physically present within the United States are entitled to due process of law under the Fifth Amendment. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guarantied [*sic*] by [the Fifth and Sixth] [A]mendments, and . . . even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."); *accord Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("*Whatever his status under the immigration laws*, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." (citations omitted) (emphasis added)). This assertion was so fundamental that even the dissent in *Plyler* did not question its validity: "I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment *applies* to aliens who, after their illegal entry into this country, are indeed physically 'within the jurisdiction' of a state." *Id.* at 243 (Burger, C.J., dissenting) (emphasis in original).

That constitutional due process protections are afforded to all those physically within our borders was most recently affirmed in *Zadvydas*. As the majority noted,

> It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our

> *geographic borders*. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

533 U.S. at 693 (citations omitted) (emphasis added). Indeed, this point is so well-established that in *Mezei*, the case principally relied upon by the Government, this Court noted, "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." 345 U.S. at 212; *see also Matthews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States," and "the Fifth Amendment . . . protects every one of these persons from deprivation of life, liberty, or property without due process of law," including those "whose presence in this country is unlawful."). Not only does the plain language of the Fifth Amendment, bolstered by *Zadvydas*, support the claims advanced by Petitioner in this case, so too does the very inconsistency of the Government's position.

B. Holding that Aliens Paroled into the United States Do Not Have Due Process Rights Would Contradict the Purpose of the Entry Fiction and Irrationally Grant More Protection to Undetected Aliens than to Parolees Whose Presence Was Previously Deemed Benign.

It is ironic that the Government in this case seeks to use the entry fiction to achieve a result that is directly contrary to the device's central purpose. Generally, the Government uses the entry fiction to avoid the very kind of indefinite

detainment that it asserts the right to impose in this case; typically the device has been invoked to limit detention, not to justify it. *See Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (the entry fiction is "simply a device through which needless confinement is avoided while administrative proceedings are conducted").

The Government's present application of the entry fiction is also irrational. If the Government prevails, the result would be to accord greater constitutional protection to those illegal aliens who sneak across the border undetected than to those who are stopped and subsequently paroled in after a determination that their presence would be benign. *See Plyler*, 457 U.S. at 210, 243. Such a result makes little constitutional sense. It would protect aliens whose presence and purpose previously were unknown without affording protection to those aliens whose presence and purpose were known and previously determined not to be a threat.

II. DANIEL BENITEZ HAS A DUE PROCESS RIGHT TO JUDICIAL REVIEW OF HIS DETENTION.

At the core of liberty is freedom from arbitrary restraint. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action."); *accord Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the Clause protects."). And judicial review is the only protection an individual has against arbitrary detention by the Government. Nevertheless, in this case, the Government seeks approval to detain Daniel Benitez indefinitely, without review and for no reason other than its

arbitrary decision to revoke his parole. Such indefinite detention is fundamentally incompatible with the Fifth Amendment's guarantee of due process.

Amicus does not ask this Court to set parolees like Daniel Benitez free. Amicus does not dispute that "the power of the State to confine persons who constitute a real, continuing, and serious danger to society is well established." *See Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring). Rather, Amicus merely asks that Daniel Benitez and other aliens who are present in the United States and cannot be deported be afforded an opportunity—some judicial *process*—by which to test the Government's reason for detaining him. Permitting the Government to detain parolees at its sole discretion and without reviewable explanation would vitiate the guarantee of due process afforded parolees by the Fifth Amendment.

A. Indefinite Detention Without Review of the Government's Reasoning Shocks the Conscience.

It can hardly be questioned that Daniel Benitez and other parolees cannot be summarily executed. They cannot be allowed to starve to death. They cannot be tortured. They cannot be denied medical care. The reason is clear: Some restraints on individual liberty are so egregious that they "shock the conscience," thereby violating the Fifth Amendment's due process guarantee. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)). Here, the Government asserts the authority to do something equally egregious. It claims the discretionary right through an administrative fiction to arrest a person previously paroled into the country, to place him in a cell, and potentially to detain him *forever*, without

opportunity for any sort of judicial review. *See* Brief for Appellee at 19–22, *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003) (No. 02-14324). Such an extraordinary claim of authority to deny a person's liberty shocks the conscience.[12]

B. The Government Has the Burden to Show that a Detention is Reasonable.

This Court has made clear that the Government cannot detain an individual without providing some legitimate reason for doing so. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997) (recognizing the burden on the Government to justify detention). That right is secured by the Due Process Clause of the Fifth Amendment. *See, e.g.*, *id.*; *Salerno*, 481 U.S. at 747–48. Even juveniles—a category of persons over whom the Government has great discretionary control—cannot be indefinitely detained without good reason. *See Reno v. Flores*, 507 U.S. 292, 315–16 (1993) (O'Connor,

---

[12] "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199–200 (1989). "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200. "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id*; *see also Youngberg v. Romeo*, 457 U.S. 307, 317 (1982); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

J., concurring) (stating that juveniles, despite their unique status under the law, cannot be indefinitely detained merely because a relative is not available to assume responsibility for them). To be sure, "[i]t is neither arbitrary nor capricious to detain the aliens when necessary to avoid the risk of flight or danger to the community." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., concurring). But, at the very least, persons such as Daniel Benitez must be given the opportunity to appear before a fair and impartial magistrate to challenge the Government's assertion that they are dangerous or that other good reason exists for their detention. Any other result would be "the hallmark of a police state, not a free society." *U.S. v. Montoya de Hernandez*, 472 U.S. 531, 550 (1985) (Brennan, J., dissenting).

C. International Law Also Condemns Indefinite Detention.

Not only does indefinite detention without judicial review violate the Fifth Amendment, made clear by more than a century of this Court's jurisprudence, it also is inconsistent with international norms and standards that are instructive in determining the contours of American law. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").[13]

---

[13] In the past, this Court has found support in international law principles when analyzing issues involving fundamental rights in this context and others. *See, e.g.*, *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) (citing international law as instructive on the contours of due process); *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (using comparative constitutional law to define the

It is a fundamental principle of human rights law that no one should be arbitrarily placed in detention. Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) ("A state violates international law if, as a matter of policy, it practices, encourages, or condones . . . prolonged, arbitrary detention."). The Universal Declaration of Human Rights—effectively the Declaration of Independence of international law—for example, states: "No one shall be subjected to arbitrary arrest, detention or exile." G.A. Res. 217, U.N. GAOR, 3d Sess., 183d plen. mtg. Art. 9, at 137, U.N. Doc A/810 (1948). And the International Covenant on Civil and Political Rights provides: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his

---

contours of due process rights); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (using international law as persuasive authority to hold that the execution of mentally retarded individuals is cruel and unusual punishment); *Printz v. United States*, 521 U.S. 898, 921 n.11, 976 (1997) (Breyer, J., dissenting) (noting that other nations with federal systems "have found that local control is better maintained" by allowing the national government to use local governments to administer national law); *Roe v. Wade*, 410 U.S. 113, 129–33 (1973) (Blackmun, J.) (citing to Persian, Greek, Roman, and English laws to show that abortion before quickening was not an indictable offense); *New York v. United States*, 326 U.S. 572, 580, 583 (1946) (Frankfurter, J.) (appealing in two footnotes to the laws of Argentina, Canada, and Australia to uphold the right of Congress to tax the state of New York on sales of mineral waters); *Muller v. Oregon*, 208 U.S. 412, 419–20 (1907) (Brewer, J.) (adopting as persuasive authority the various foreign statutes initially presented by the soon-to-be Justice Louis Brandeis in the famous "Brandeis Brief"). It is appropriate, therefore, to examine international law principles when analyzing the justness of indefinite detention policies as applied to aliens.

detention and order his release if the detention is not lawful." G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 168, U.N. Doc. A/6316 Art. 9 para. 4 (1967).

As Justice Kennedy noted in *Zadvydas*, detention is arbitrary when it is haphazard, unwarranted, or not accompanied by fair procedures for legal review. 533 U.S. at 718–19 (Kennedy, J., dissenting) (citing, among other authorities, international law). Even when parolees such as Daniel Benitez have been detained in conformance with the law, they are stiil entitled to judicial review of the Government's reasons for their detention. Thus, denying parolees *any* opportunity to challenge the reasons for their re-arrest and indefinite detention violates not only the guarantees of the U.S. Constitution, but also principles of international law.

CONCLUSION

The Constitution exists as a bulwark against arbitrary and capricious Executive discretion. It is not for the Executive to decide whether and when his actions are appropriate, but rather this test falls to the Court. Amicus again urges the Court to make clear its view that in the absence of special circumstances, not presented in this case, no person physically present within the United States may be detained indefinitely without due process of law. For the reasons set out above, the decision of the court of appeals should be reversed.